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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1927

No. ~~768~~ 68

FOSTER FOUNTAIN PACKING COMPANY, INC., and SEA FOOD COMPANY, Appellants,

versus

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC, ET AL.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

No. ~~769~~ 69

L. O. JOHNSON, JR., and SEA FOOD COMPANY, TANAS HEBERT, ET AL., Appellants,

versus

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC, ET AL.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

The Above Cases Consolidated by Order of This Honorable Court.

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Peyton R. Sandoz, Asst. Atty. General;
Michael M. Irwin, Asst. to Atty. General.
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MONTGOMERY-ANDREWS PRINTING CO., INC., 507 CHARTRES, N.O.

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E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC, ET AL.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

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Appeal from the District Court of the United States for the Eastern District of Louisiana.

The Above Cases Consolidated by Order of This Honorable Court.

STATEMENT.

By reason of the fact that the above numbered and entitled causes have been consolidated by an order

of this Honorable Court, they will be considered and treated of in this brief as one proceeding, because the constitutional questions advanced in each are almost identical.

The plaintiffs in suit No. 768 endeavor to contest the legality and constitutionality of Act 103 of the Legislature of Louisiana of 1926, and particularly Sections 4, 10, 12, 13, 14, 15, 16, 19 and 21 of said Act, as being in violation of the Constitution of the United States, these specific alleged violations will be hereinafter detailed. The aforesaid Act is ordinarily known and referred to as the Louisiana "Shrimp Law."

In the suit No. 769 a similar attack is made upon Act 258 of the Legislature of Louisiana of the year 1926, and particularly Sections 1, 2, 3, 4, 23 and 24 of said Act, the aforesaid Act being ordinarily referred to as the Louisiana "Oyster Law."

In each of the aforesaid cases the plaintiffs in error attempted to obtain an injunction to restrain the enforcement of the Shrimp and Oyster Laws, and, as is usual in such cases, a temporary restraining order was issued in each, and upon final hearing the restraining orders were recalled and the prayer for a permanent injunction denied. Thereupon, application was made for an appeal to this Honorable Court, which was granted. There was no particular opposition to this application on the part of the State of Louisiana or any of the defendants in error, who are really for all intents and purposes the representatives of the State of Louisiana, but there was no specific consent to the granting of the appeal by the District Court. The issues involved while numerous, because of the al-

leged unconstitutionality of the two acts, are comparatively simple and have been determined by this Honorable Court in numerous decisions.

The questions really involved are whether or not the State of Louisiana has a right to adopt laws to conserve its natural resources. The natural resources involved in these two proceedings are Shrimp and Oysters. The State of Louisiana has, by various statutes dating back quite a number of years, endeavored to preserve for its inhabitants certain articles of food, such as game, fish and oysters. The negligence of our sister State in this respect has caused it to exhaust and consume the very articles of food which Louisiana desires to preserve for itself, and now that the supply of that State is practically exhausted Mississippi seeks to prey upon and utilize and consume that which Louisiana has for years past taken the precaution to preserve.

THE EVIDENCE.

We will not attempt to detail the evidence relied upon by the plaintiffs in error, because the record contains each and every affidavit submitted, but the burden of these affidavits, as indicated by them, is that the motive on the part of the plaintiffs in error in desiring to use and utilize the Shrimp and Oysters of Lousiana is that the State of Louisiana is not qualified, so to speak, to properly can and sell these food products, because of the fact that at the points where shrimp and oysters are most available the conditions are such that it is almost impossible for any person to live because of the prevalence of mosquitoes and some imaginary insect which they specify as "green-head."

The preposterous and absurd contention is contained in these affidavits that the presence of these two insects make it impossible for any human to dwell in the locality where shrimp and oysters are still found, "unless he be so native to the soil and acclimated to the action of these insects that he can suffer and stand a continuous attack of these insects, which is sufficient to drive the ordinary man mentally insane." (See Tr., p. 79).

The same absurd reasoning is contained in all of the other affidavits supplied by the plaintiffs in error. How such puerile contentions can be urged in cases of vast importance, such as these, is difficult to understand.

However, these same affidavits, aside from the very unwarranted attack by these supposed Mississippians upon alleged conditions in their sister State of Louisiana demonstrate, on their face, that Mississippi has been neglectful of her interests in conserving her natural resources. The same waters of the Gulf that bathe her shores lap the shores of Louisiana, but unfortunately for Mississippi, the greed of those engaged in the Shrimp and Oyster industries has exhausted her supply, while Louisiana has for years past taken the precaution to conserve her supply.

We do not consider that much language should be wasted with reference to the mosquitoes and greenhead theory, because we believe that this Court can well take judicial cognizance of the fact that mosquitoes are possibly as plentiful, if not more so, in Mississippi than they are in Louisiana, and are quite common in very many other States of the Union.

Another contention of absolute insignificance advanced by the plaintiffs in error is that:

> "The coast of Mississippi is peculiarly adapted to the canning of shrimp on account of its clear, pure water, but that it is not practical to can and pack shrimp west of the Mississippi River in the State of Louisiana, for the reason that there is a greater lack of community life and the absence of pure water needed in the canning and packing of these shrimp to make the same of high market value." Tr., p. 85.

The other affidavits submitted by plaintiffs in error contain similar statements, but no proof of these vague conclusions has been offered, and none could have been offered, for the reason that no man of probity, acquainted with conditions in Louisiana, would condescend to have made any such erroneous and unjust statement.

The evidence clearly shows that the plaintiffs in error not only appeared before the Legislature of the State of Louisiana on each occasion, that is to say, upon the occasion of the adoption of the "Shrimp Act," and upon the occasion of the adoption of the "Oyster Act," to exert every influence that they could to have the laws so framed that they could utilize Louisiana's products, which their negligence had caused them to lose for themselves; but when they found that they could not they actually acquiesced in both Acts, their sole and final condition being that the laws would not become immediately operative, but that practically a year should elapse before they should become effective.

Thereafter, these same plaintiffs engaged in business in Louisiana; took out licenses, and in every way acknowledged and admitted the right and authority of the State of Louisiana to adopt the laws against which they now complain.

The foregoing statement has reference to the plea of estoppel filed in the Shrimp law case, and which we now discuss.

ESTOPPEL.

The plea of estoppel filed in record No. 768 (Tr. 37) by respondents, applies only to the shrimp case, but a careful examination of all the affidavits appearing in record No. 769 would make it appear that it could be applied to the oyster case as well.

It was our contention in the Court below, and we now renew it, that the open and active participation by complainants, its agents, and representatives in bringing about the provisions of Act 103 of the Legislature for the year 1926, in its final passage estops complainants from asserting that said Act is unconstitutional.

Act 103, known as the "Shrimp Law," at the time of its introduction in its original form and if it had passed and was adopted, was to go into effect at once, but due to the fact that various interests representing the canning and packing industries of the State of Mississippi had so vigorously opposed this legislation in its original form, and upon the serious requests of complainants, through their representatives, that if the date of its enforcement was postponed one year,

to-wit, from July, 1926, until June 15, 1927, so that the Mississippi canneries and packers would have ample time to acquire sites in Louisiana if they saw fit, the opposition to the passage of this measure would cease.

Whereupon, Act 103 of 1926 was passed and approved with the provision asked for by complainants in the following language, to-wit (Tr. 123, No. 768):

"Amendments to House Bill No. 177 by Mr. Ellender.

On page 18 of the printed bill at the end of line 30 strike out the period and insert a comma, followed by the words 'provided that, in order to permit canning factories located beyond the limits of this State which have heretofore been permitted to take salt water shrimp out of the State for canning purposes to adjust their business to the conditions imposed by this Act, the provisions of this Act which require all salt water shrimp to be peeled or removed from their hull or shell in Louisiana and the shrimp head and hull or shell to be left in Louisiana shall not go into effect until June 15, 1927, as to those shrimp canners who shall have obtained from the Department of Conservation permits permitting such canneries until June 15, 1927, to remove from the State salt water shrimp unpeeled for canning in factories located beyond the limits of the State, conditioned upon the right being reserved to the Department of Conservation of Louisiana to revoke any such permit upon the failure to be determined as

a matter of fact, after hearing, by the Department of Conservation of Louisiana, that such permittee or licensee has failed to comply with the conditions imposed in such permit, and the Commissioner of Conservation shall be authorized to issue permits in accordance herewith, which permits shall expire June 15th, 1927.

It is the intention and sense of this exception that the canning factories located out of the State which have heretofore gotten their salt water shrimp from Louisiana shall be permitted to continue to do so under former conditions, until June 15th, 1927, except that the closed seasons herein established shall become effective upon the due promulgation of this Act.

(Signed) Jules G. Fisher,
(Signed) Donald Laffe,
(Signed) Delos R. Johnson.

Approved:

(Signed) John Dymond, Jr.
(Signed) Chas. L. Wise.
(Signed) Arthur J. O'Keefe, Jr."

In order to show the exact situation that prevailed when this Act was up for passage, we take the liberty of setting forth an excerpt from the affidavit (Tr. 118, No. 768) of Mr. John Dymond, who at that time, as evidenced by his approval of the amended section of Act 103 of 1926 above set forth, acted as leading counsel in having Act 103 of 1926 passed.

"During the said legislative session and the consideration of said legislation by the

House and the Senate there appeared people representing the proponents of said measures, and people representing the opponents of said measure, and that among those representing the opponents of said measure were the canning and packing interests of the State of Mississippi, and among the opponents of said measure was the Foster Fountain Company, Complainant herein, as represented by R. Hart Chinn, President, and that the said R. Hart Chinn addressed the Committee of the House considering said legislation in opposition to said legislation; that the Mississippi interests were represented by Arthur J. O'Keefe, Jr., an Attorney at Law, residing in the City of New Orleans, who appeared on behalf of the Mississippi interests, including Foster Fountain Company, Complainant, in opposition to said proposed legislation, and that said Mississippi interests were further represented by Honorable John J. Kennedy, Mayor of Biloxi, Miss.;

"That at the time of the introduction of said House Bill No. 177, and at the time of its consideration by the Committee of the Senate, said measure proposed to go into effect at once. Whereupon, the request was made on behalf of the Complainant and others, that opposition to said measure would cease if the date of its enforcement was postponed one year, or until June 15, 1927, and said measure thereupon was passed by the House of Representatives and Senate, and approved by the Governor on July 18th, 1926,

containing a provision to the effect that the law should not go into effect until June 15th, 1927, in order to permit any Mississippi interests to acquire factory sites in Louisiana."

The above excerpt, together with the original compromise and agreement, copy of which is set forth in full *supra*, clearly demonstrates the active participation of complainants. Coupled with this outweighing evidence is the statement of Mr. R. Hart Chinn, President of the Foster Fountain Company, one of the complainants herein (Tr. 68, 70, No. 768), and the appreciative letter of Hon. John J. Kennedy, Mayor of Biloxi, Mississippi, who also represented the Mississippi interests (Tr. 124, No. 768):

"When it became apparent that, in spite of his objections, as well as the objections of other persons, the bill (No. 77, R. No. 768) would be passed, affiant, as he had the right to do, acquiesced in the amendment postponing the effective date of the Act for one year."

"City of Biloxi,
John J. Kennedy, Mayor,

Biloxi, Mississippi,
June 24, 1926.

Mr. John Dymond, Jr., Atty.,
Maison Blanche Building,
New Orleans, La.

My dear John:

I thank you for the copies of the Shrimp Bill that you were kind enough to send me and if there are any charges for same, if you

will let me know the amount, I will send you a check.

I suppose the compromise was best for all parties concerned but I want to repeat to you that in my honest opinion the future will show that my opponents are absolutely wrong about this matter, and I believe the future will convince them of this fact.

Whenever you are on the Coast would be glad to have you come to Biloxi that I might open your eyes showing you developments.

With very best wishes, I am

Sincerely yours,

(Signed) Jno. J. Kennedy.

After Act 103 of 1926 had gone into effect, that is, after June 15th, 1927, complainant, Foster Fountain Company, Inc., applied for and did receive from the Department of Conservation of the State of Louisiana licenses and permits for the taking of salt water shrimp from the waters of Louisiana, and since the licenses (Tr. p. 50-52; R. 768) and permits issued by their very terms:

> "That every license issued by the Department of Conservation to any resident person, firm or corporation, under the laws of the State, authorizing the taking of salt water shrimp from the waters of the State for sale in their fresh state, or for canning, packing, or drying purposes shall be issued only upon a written application in which it shall be stipulated as a matter of contract

> that the applicant will faithfully and fully comply with the laws of this State, and the rules and regulations of the Department of Conservation and will promptly pay the severance taxes levied on salt water shrimp taken from the waters of the State for canning, packing or drying in this State or for sale in their fresh state in this State. The Department of Conservation shall have the right to refuse to grant a license to any canning, packing or drying plant engaged in the shrimp industry that does not fulfill the requirements of (fol. 49) the specifications of the Board of Health of the State of Louisiana adopted for sanitary regulations, the right of appeal being reserved to such applicant to the Court having jurisdiction thereof to review the findings of the Department of Conservation on the subject."

constitute a contract between applicant and the State of Louisiana, they are therefore estopped from contesting any section or sections of Act 103 of 1926 pertaining to its constitutionality.

Authorities sustaining the above proposition are numerous, and we herewith submit the following, contending that our plea of estoppel should be maintained in view of their holdings.

Shepard v. Barron, 194 U. S., 553, 48 L. Ed., 1116:

In this case plaintiff, a property holder, filed his bill in the Circuit Court of the United States to enjoin a county treasurer from taking proceedings for the

collection of the balance of an assessment for a local improvement upon his property, on the ground that the Act under which the assessment was being made was unconstitutional. The defense was made that because the property holder had joined in a petition for the making of the assessment, he was precluded from setting up the unconstitutionality of the Act.

Mr. Justice Pepper, in deciding the case, first stated that both parties agreed that the statute was void and in violation of the State Constitution, and that the invalidity of the statute had been declared by the Circuit Court of Appeals. He then discussed the conduct of the complainant with a view of determining whether it precludes him from raising the objection of unconstitutionality, and said in part:

> "It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking the nature of both, the result arrived at being that the plaintiffs are told that under all the facts proved in the case they cannot set up the unconstitutionality of the Act, or that they are bound by their contract to pay the assessment.
>
> "On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken, and that the assessment should be made in accordance with those provisions."

Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax which he subsequently complains; and some of the cases go so far in that direction as to hold that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. Cooley, Taxn., p. 573, and cases cited in Note 5; Tash v. Adams, 10 Cush., 252; Bidwell v. Pittsburgh, 85 Pa., 412, 27 Am. Rep., 662; Shutte v. Thompson, 15 Wall., 151, 21 L. Ed., 123.

The above case of *Shepard v. Barron* was cited and approved in *Rand-McNally & Co. v. Kentucky, 215 U. S., 583, 54 L. Ed., 337.*

In *Wight v. Davidson, 181 U. S., 371, 45 L. Ed., 900, 21 Sup. Ct. Rep., 616,* this Court, while not positively deciding the proposition, yet strongly intimated *(p. 377, L. Ed., p. 904, Sup. Ct. Rep., p. 618)* that by reason of the acts of the appellees they were not in a position to question the validity of the statute there under consideration, but as there were others than the appellees concerned, and a decision of the Court of Appeals had declared the act void as to the appellees, it was thought better to pass by the question whether they were estopped by having made the dedication provided for in the act, and to decide the question of the constitutionality of the Act of Congress under

which the proceedings were had. The Act was held to be valid.

6 Ruling Case Law, p. 94, Sec. 95:

PROCURING PASSAGE OF LAW OR ELECTING TO PROCEED UNDER IT.

"*A person in any way procuring the passage of an act is generally considered as estopped, and as not being entitled to question its validity. (Shepard v. Barron) supra. It is not necessary in order to work an estoppel that active efforts should have been made to secure the passage of the statute in question.* The rule is now generally recognized that one who invoked the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense. Under this principle a creditor electing to avail himself of proceedings under a statute cannot raise an objection that the law did not constitutionally apply to his case. Where the provisions of a statute are taken advantage of and the bond required by it is filed, the estoppel as to the constitutionality of the statute, extends not only to such creditor, but to the sureties on his bond."

Andrus v. Police Jury, 41 La. Annual, 697, 6 So., 603:

"A taxpayer who petitions for the passage of an ordinance levying a special tax, who actively supports and votes for the ordi-

nance when submitted to the votes of the taxpayers, who has so acted in advancement of his own interest, and who has secured advantage from the passage of the ordinance, upon which other parties have acted, is estopped from setting up the illegality and unconstitutionality of the tax as a defense against paying it."

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"And now, after thus actively cooperating in securing the levy of this tax, and after he has entered into secure enjoyment of all the benefits contemplated and conferred by the same, he seeks to escape payment of the tax by urging objections to the legality and constitutionality of the very ordinance which he petitioned the board to pass, which he pledged himself actively to support and which he actually voted for.

"It is perfectly clear that he is estopped from urging such objections. All authorities accord in maintaining estoppel in such a case."

Cooley on Taxation, p. 817, says:

"It sometimes happens that a party who complains of illegal taxation has been so connected with the proceedings in voting, levying or collecting the same, that it would be unjust and inequitable to others or to the public that any remedy should be given him in respect to the illegality. Such a case would

exist if one in respect to some interest of his own should petition for or otherwise actively encourage the levy of the tax of which he subsequently makes complaint."

Bigelow on Estoppel, p. 509, 6th Edition, says:

"*This doctrine* (of estoppel) *has been held to apply to the case of persons who had procured the passage of an act of the Legislature under which they had acted and obtained advantage;* and the parties were thereafter held estopped to show that the act was unconstitutional, though it had been so pronounced by the courts to those who had not participated in its passage."

Burrough on Taxation, Sec. 38, says:

"*It is a principle well recognized that all who aid in procuring an act of the Legislature, or who ratify it after its passage, are bound by it.* * * * The principle requires the assent of those who are to bear the burden; if a number of citizens procure an enabling act to allow a city to subscribe to the stock of a railroad, it binds those who procure it and those who ratify, but those who do not assent to it are not bound."

Moore v. City, 32 La. An., 745:

"There are cases in which a law, although unconstitutional, must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard."

Ferguson v. Landram, 5 Bush (Ky.), 230, 96 Am. Dec., 35:

Syllabus:

> "One who procures passage of act, or who afterwards sanctions it, or derives interest or consideration from it, should not be allowed to retain his advantage or keep his consideration, and then repudiate the act as unconstitutional."

The above case is one where, during the Civil War, the Federal Government required a certain number of men to be provided by a certain date or drafted. Many not desiring the service met and subscribed an amount to be given those who would volunteer in order that they might not be drafted, appointed a committee to borrow the money and obtain an act of the Legislature to authorize a tax to meet the loan.

The Court further said:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent or subsequently sanctioned by him; or from which he derives an interest or consideration, then keep the consideration and repudiate the statute as unconstitutional?"

Moreover, complainants having suggested the manner by which they would abide by the provisions of Act 103 of 1926, and having passed in the manner as

suggested by them, by which they received benefits and immunities which it bestowed, to-wit: postponement of its enactment for one year—they cannot now escape its burdens by asserting that it is unconstitutional. The accepting and active participation by complainants constitutes a waiver and estops them from asserting such an attack.

See:

Booth Fisheries Co., et al., v. Industrial Commission of Wisconsin, et al., 271 U. S., 208, 46 Sup. Ct. Rep., 491, 70 L. Ed., 908.

Daniels v. Tearney, 102 U. S., 415, 26 L. Ed., 187.

Grand Rapids & I. R. Co. v. Osborn, 193 U. S., 17, 48 L. Ed., 598.

It is fundamental that anyone that asks equity must do equity, and he who comes into an Equity Court must come in with clean hands. Therefore, in view of the above facts and authorities sustaining our contention, it seems to us that the proposition and only proposition this Court has to determine is—can complainants, all of whom, either directly or indirectly, participated in having Act 103 of 1926 passed in the manner in which it was finally adopted, and who have received a benefit therefrom, can now come into Court and ask for protection? To our way of thinking, complainants, as between themselves and the State of Louisiana, have failed to do equity and, therefore, do not come into Court with clean hands, consequently, they are estopped in their attempt to assail Act 103 of 1926 as being unconstitutional.

ARGUMENT.

The plaintiffs in error contend, with reference to the Shrimp Law, that Sections 4, 10, 12, 13, 14, 15, 16, 19 and 21 of the Act, No. 103 of 1926, are in contravention of and violative of paragraph 3, subdivision "a," Article I of the Constitution of the United States, in that the aforesaid sections of the aforesaid act contain provisions which are violative of the interstate and foreign commerce clauses of the Federal Constitution.

We divert to call the Court's attention to the fact that the same contentions are levelled against the "Oyster Law," officially known as Act 258 of the Legislature of Louisiana of the year 1926, and since these cases have been consolidated we shall present our argument in connection with the Shrimp Law, in the hope and belief that the same argument has like application to the "Oyster Law," this for the purpose of avoiding needless repetition of argument and burdening the Court with a useless resume of legal and constitutional questions which are determinative, in our humble opinion, of the issues of both cases.

To the contention that the Shrimp Act, No. 103 of 1926, is violative of the interstate and foreign commerce clauses of the Federal Constitution, our answer is that the aforesaid Act specifically provides:

> "That all salt water shrimp existing in the waters of this State, and the hulls and all parts of said salt water shrimp shall be and are hereby declared to be the property of the State; and to remain the property of the State

until the title thereto shall have been divested in the manner and form authorized by said Act."

That the Act specifies the terms and conditions upon which the title of the State to the shrimp may be divested, and particularly accentuates the fact that the shrimp are, and continue to be, the property of the State until all of the conditions of said Act shall have been complied with. Therefore, the shrimp cannot, in a legal sense, become an article of commerce until the title of the State has been divested. So that, any complaint that the statute interferes with the interstate commerce clause of the Constitution is not only premature, but unfounded in law, unless it is shown that title of the State has been divested in the manner which the Act has prescribed.

The primary purpose of the statute under consideration is to increase the industries of the State, develop its resources, and add to its wealth and prosperity. The two particular industries contemplated by the acts in controversy are the Shrimp and Oyster industries, which the Legislature intended to develop, and to add to the wealth and prosperity of the State, by causing to be located within her borders the necessary plants and properties for the proper canning and packing of oysters and drying and canning of the shrimp, and for the manufacture of fertilizer from the hulls of the shrimp, to be used for the benefit of the State, and primarily to be sold within its borders.

This authority on the part of the Legislature to conserve a very important natural resource of the State can no longer be doubted, since it is now well estab-

lished in the jurisprudence of Louisiana and in the other States of the Union and of the United States Supreme Court, that

> "the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment of the Federal Constitution, was designed to interfere with the powers of the State, sometimes termed its *police power*, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate *so as to increase the industries of the State*, develop its resources, and add to its wealth and prosperity."

This specific principle is set forth, recognized and affirmed in the following cases by the United States Supreme Court:

Barbier v. Connolly, 113 U. S., 31, 28 L. Ed., 923.

Holden v. Hardy, 169 U. S., 366, 42 L. Ed., 780.

Dent v. West Virginia, 129 U. S., 114, 32 L. Ed., 623.

Mugler v. Kansas, 123 U. S., 623, 31 L. Ed., 623.

Munn v. Illinois, 94 U. S., 113, 24 L. Ed., 77.

Budd v. New York, 143 U. S., 517, 36 L. Ed., 247.

Smyth v. Ames, 169 U. S., 466, 42 L. Ed., 819.

The foregoing principle was expressly upheld by the Supreme Court of Louisiana, in *Lacoste v. Depart-*

ment of Conservation, 151 La., p. 909, 92 So., 381, which case found its way to the United States Supreme Court and was there affirmed, and is reported in *263 U. S., 545, 68 L. Ed., 437.*

We point out that insofar as legal principles involved in this case are concerned, there is no material distinction between fish and any of the other wild life of the State. Fish and game and fur-bearing animals have long been recognized as a part of the natural resources of the State, a part of its wild life, over which the State, in its sovereign capacity, has absolute and almost unlimited dominion.

> "Fish, so long as they remain unconfined in their natural element and are not taken and reduced to possession, are not the subject of private property, but are public property; * * * and, in the United States, are considered to be the property of the state in whose waters they may be found, not as proprietor, but in its sovereign capacity, as the representatives and for the benefit of all of its people in common, and the ownership thereof cannot be claimed by any particular individual."
>
> *26 Corpus Juris, Sec. 7, pp. 596, 597.*
> *Gratz v. McKee, 258 Fed., 335;*
> *169 C. C. A., 351; 260 U. S., 127, 67 L. Ed., 167.*

So that, no natural resource, until it is reduced to private possession, can become the subject of commerce; and since shrimp and oysters, in Louisiana, can only become private property under certain specified

conditions established by statute, no one has a right to complain that the provisions of the statute interfere with interstate commerce, until he has first shown that he has reduced the shrimp and oysters to private possession.

In *12 Corpus Juris, Sec. 74, p. 61*, the principle is laid down that a State may, without unduly interfering with interstate or foreign commerce, prohibit the citizens of other States from fishing within its limits, as navigable waters, their beds and contents, are State property.

In support of this decision is cited:

McCready v. Virginia, 94 U. S., 391, 24 Law Ed., 248.
Smith v. Maryland, 18 How., 71, 15 Law Ed., 269.
State of Alabama v. Harrub, 95 Ala., 176, 10 So., 752, 15 L. R. A., 761.
State v. Medbury, 3 R. I., 138.
Organ v. State, 56 Ark., 267, 19 S. W., 840.
State v. N. P. Express, 58 Minn., 403, 59 N. W., 1100.
Territory of Idaho v. Evans, 7 L. R. A., 288.

A leading case of the United States Supreme Court dealing with this proposition, is *Geer v. Connecticut, 161 U. S., 519, 40 L. Ed., 793*, wherein it is held

> "that a state has the absolute and unconditional right to enact legislation to prohibit absolutely the removal of game from the State."

This case has been upheld and affirmed in practically every decision relating to wild life handed down by the United States Supreme Court since, and has been quoted and relied upon as authority by the Supreme Court of practically every State in the Union. Therefore, if the State has the unlimited right to prohibit absolutely the removal of its fish, game and other wild life from the State, it is clear that it may permit the removal of such wild life from the State under certain prescribed conditions, and that is all that Act 103 of 1926 contemplates or provides for.

In fact, the Lacy Act, *Sec. 242, 35 Stat. at Large, page 1137 (U. S. Comp. St., Sec. 10412)* makes it unlawful to transport or deliver to any carrier for transportation the dead bodies or heads of any animals or birds killed or shipped in violation of State laws.

The identical principle was recognized by the United States Supreme Court, in the *Lacoste* case, already referred to.

One of the leading cases relating to the ownership of fish, and the conditions upon which the same may be permitted to be shipped out of the State under legislative enactment, is *Organ v. State, 56 Ark., 267; 19 S. W., 840,* from which we quote, as follows:

> "The ownership of fish is in the state for the benefit of its people in common, and the Legislature has the right to permit individuals to catch them upon such terms and conditions as it may impose, and to restrict the property acquired in them when caught to such extent as it deems proper. It may pro-

hibit catching them entirely, or for a specified season; or it may permit them to be caught for the use of the person who makes the catch, and withhold the right to sell them, or ship them for sale. When preserved for the common benefit of the people of the state, they are not articles of commerce in any sense, and we cannot see that they become such simply because the legislature permits them to be caught by individuals for use within the state only. One who catches them had originally no separate property in them, and no right to acquire it except as the Legislature might provide. As all right of property in them is derived from the state, it is subject to such terms as the Legislature imposes. It saw fit in the act assailed to confer a right of property, but to so limit it that the article should not be shipped from the state, the purpose being to restrict the use to those who originally owned it in common. The restriction was imposed by right of ownership, and not in the exercise of any assumed power to regulate the commercial uses of private property. Under this limitation, fish never pass from the dominion of the state as proprietor, or become articles of commerce, in the sense contended for by the defendant, because the qualified property right is conferred upon condition that the use shall be restricted and shipment from the state not allowed. It follows that the act does not violate the Commerce Clause of the Federal Constitution, and it could not be seriously con-

tended that it violated any other constitutional provision."

Another case in point is *State v. Northern Pacific Express Co., 58 Minn., 403, 59 N. W., 1100,* from which we quote, as follows:

> "On the second question the defendant's contention is that the provisions of the act prohibiting the shipment out of the state of fish caught within the state unlawfully interferes with interstate commerce. The complete answer to this is that the fish had never become articles of commerce, within the meaning contended for by defendant's counsel. Under the laws of the state, they had, it is true, become private property, but of a qualified and limited character; one of the attached limitations being that they should not be shipped out of the state, that is, should not become the subject of interstate commerce. The purpose of such a provision as a means of preventing a rapid and undue depletion of certain kinds of game has already been adverted to in the cases just mentioned (State v. Rodman and State v. Cobb). Similar provisions are very commonly found in laws for the preservation of game and have been generally upheld as valid."

It is further contended that the aforesaid sections of the Act 103 of 1926 are violative of Article I of the Fourteenth Amendment to the Federal Constitution, in that they serve to deprive plaintiffs of their property without due process of law.

It must be borne in mind that plaintiffs have no property in shrimp and oysters until they have complied with every provision and condition set forth in the "Oyster and Shrimp" statutes; that the shrimp and oysters remain absolutely the property of the State of Louisiana, with only a qualified and limited ownership in the plaintiffs, until such time as the plaintiffs have complied with the laws of Louisiana on the subject matter. Hence, it would be legally impossible to deprive plaintiffs of their property without due process of law, unless and until they have acquired a property right in the shrimp and oysters.

The *Lacoste* case, already referred to, disposes of this contention fully.

It is pointed out that the provisions of the aforesaid Act of 1926 apply to all persons in like circumstances and conditions. This being true, it has been repeatedly held by the United States Supreme Court that

> "the Fourteenth Amendment legitimately operates to extend to the citizens and residents of the State the same protection against arbitrary State legislation affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress; but the Federal Courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and the Federal Courts should not interfere unless there is

> some abuse of law amounting to confiscation of property or deprivation of personal rights."

A leading case dealing with this particular phase of plaintiff's suit is that of *Silz v. Hesterberg, 211 U. S., 31, 53 L. Ed., 75,* a decision which has been repeatedly quoted by the United States Supreme Court and by the Supreme Court of the various States.

> *Hibben v. Smith, 191 U. S., 325, 48 L. Ed., 195.*
>
> *French v. Barber Asp. Co., 181 U. S., 329, 45 L. Ed., 879.*
>
> *Carroll v. Greenwich Ins. Co., 199 U. S., 401, 50 L. Ed., 246.*
>
> *Hurtado v. California, 110 U. S., 535, 28 L. Ed., 232.*

In *Tyler v. Judges, 179 U. S., 410, 45 L. Ed., 252,* it was held:

> "The constitutionality of a statute cannot be assailed unless the party questioning it has been, or is likely to be deprived of his property without due process of law. A court cannot assume to decide the general question as to whether the statute, as to some other person, amounts to a deprivation of property."

The mere contention of plaintiffs that they are deprived of their property without due process of law, without conclusive evidence of the fact that they are so deprived, amounts to nothing. And, as has been al-

ready pointed out, the plaintiffs, nor others similarly situated, have no property rights in shrimp of which they may be deprived without due process or otherwise, until they have acquired a property right in the shrimp by full compliance with the Louisiana statute.

> "A party has no interest to assert that a statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his constitutional right."
>
> *Castillo v. McConnico, 168 U. S., 680, 42 L. Ed., 622.*
>
> *Strauss v. Foxworth, 231 U. S., 162, 58 L. Ed., 168.*
>
> *N. O. v. N. O. Waterworks Co., 142 U. S., 88, 35 L. Ed., 943.*

In *McCready v. Virginia, 94 U. S., 391, 24 Law Ed., 248,* it was said:

> "A right of fishing is a property right, and not a mere privilege or immunity of citizenship.
>
> "The citizens of one state are not invested by the U. S. Constitution with any interest in the common property of the citizens of another State.
>
> "A State can grant to its own citizens the exclusive use of lands covered by water, for raising oysters, and may prohibit under a penalty, their use for such purpose, by citizens of other states."

It has become a settled principle of public law that power resides in the several States to regulate and control the right of fishing in the public waters within their respective jurisdictions.

McCready v. Virginia, 94 U. S., 391, 24 Law Ed., 248.

Smith v. Maryland, 18 How., 71, 15 Law Ed., 269.

Smith v. Levinus, 8 N. Y., 472, 3 Kent Com., 415.

In *Smith v. Maryland, 18 How., 71, 15 Law Ed., 269*, it was held:

> "Whatever soil below high water mark is the subject of exclusive ownership, belongs to the state on whose borders, or within whose territory, it lies.
>
> "But this soil is held by the state subject to and in trust for the enjoyment of the public right of fishery. The state may forbid all such acts as would render the public right less valuable, or destroy it."

The specific rule was laid down in *New Orleans v. New Orleans Waterworks Co., 142 U. S., 79, 35 L. Ed., 943*, which is but the affirmance of a well-settled principle of law, as follows:

> "In order to constitute a violation of a constitutional provision against depriving a person of his own property without due process of law it should appear that such person has a property right in the particular thing of which he is alleged to have been deprived."

The foregoing case was a Louisiana case, representing one of a series heard and determined by the Supreme Court of Louisiana, and ultimately finding their way for final decision to the Supreme Court of the United States. So that, we reiterate that before plaintiffs can complain of being deprived of property without due process of law, they must first establish that they have, and *how* they acquired the property or a property right in the thing of which they claim to have been deprived; but we here point out that plaintiffs do not set forth in their petition wherein they themselves have at any time been deprived of any property in the shrimp or oysters lawfully acquired by them, or how they can be deprived of any property in said shrimp or oysters, if they obtain and acquire same in compliance with the terms of the aforesaid "Shrimp" and "Oyster" laws of Louisiana.

Plaintiffs contend that the said Act 103 of 1926 is violative of Section 2 of the Louisiana Constitution, which provides:

> "That no person shall be deprived of life, liberty or property, except by due process of law."

This is merely a reiteration of the complaint, already discussed, except to add to the contention that the sections of the act complained of, not only violate the Federal Constitution, but are violative of the aforesaid Bill of Rights of the State of Louisiana. Hence, the argument which we have advanced with reference to the contention of the plaintiffs, hereinabove referred to, will answer that which we have just noted.

The plaintiffs contend, also, that the said Act of 1926 violates the provisions of Section 14 of Article XIX of the Constitution of Louisiana for the year 1921, as tending to create a monopoly.

If plaintiffs' contention is right, their remedy is to proceed under the laws of the State enacted pursuant to its present and former Constitutions, which prevent or punish so-called monopolies, or if they believe that the laws of Louisiana are inadequate to avail themselves of Federal statutes which prevent the creation and existence of monopolies, but plaintiffs fail to point out wherein the Act of the Legislature aforesaid creates a monopoly of the shrimp and oyster trade. The statutes accord to all persons and corporations domiciled in Louisiana, or organized under the laws of Louisiana, and comprising residents of the State, to engage in the buying and selling of shrimp and oysters, in the canning and packing thereof, and under specific conditions to ship and transport the same wherever a market for them might be found. Plaintiffs lose sight of the fact that they cannot, under any circumstances, become the absolute owners of the shrimp and oysters; that they cannot divest the title of the State to the shrimp and oysters until they have complied with the provisions of the laws referred to. Whenever they have complied with the provisions of the acts and have removed the hulls from the shrimp and shells of the oysters, they are then at liberty to transport, ship, or otherwise dispose of their property as they may see fit.

The State of Louisiana, in order to upbuild its industries and to conserve its natural resources, as fertilizer, as road building material, etc., prohibits the re-

moval of the hulls of shrimp and shell of the oysters from the State, and requires that these hulls and shells be retained within its jurisdiction, to be converted into valuable fertilizer and as an element of chicken feed and as road building material, etc., for the use and benefit of the inhabitants of the State.

The State has absolute power and authority, through its Legislature, to enact such laws, which in no sense violates the interstate commerce clause of the Federal Constitution or any other part of the Fourteenth Amendment to the Federal Constitution, nor does it violate the Bill of Rights nor any Article of the Constitution of the State of Louisiana.

Possibly the clearest case and the one most in point in so far as it applies to the subject now under discussion, is that of *State v. Harrub, 15 L. R. A., 765; 95 Ala., 176 10 So., 752*, which case has been cited with approval by Federal and State Courts throughout the Union. This decision, so far as a careful research on our part has been able to reveal, has never been amended, modified or overruled, and stands today as fixed jurisprudence, serving as a guide to the Courts of the many States of the Union. In that case it was said:

> "If the State has the power to prohibit the exportation of its oysters absolutely, *a fortiori*, it may limit the shipment of such oysters to such as may have been shelled. If the Legislature sees proper as a means to prevent the exhaustion of its oyster-beds, to grant to the takers, who can only be resident citizens of the state, or their grantees within the state, such a qualified property right in

the oyster as will permit its exportation only after it is shelled, where is the authority to judicially control this discretion, or what principle of the Interstate Commerce Law is violated by such an enactment? The oyster is the absolute property of the state. It certainly has the power to prevent its becoming an article of interstate commerce. Until it becomes an article of interstate commerce Congress has no authority or control in the premises. The state, by the statute itself, expressly retains the title to the oyster, and prohibits its shipment beyond the state until shelled. Only after it is shelled does the state relinquish its title, and the grantee, previously having but a qualified interest, becomes the absolute owner, and the oyster may then become an article of interstate commerce. When shelled, and the state has parted with its property rights, the state no longer interferes with the article. The owner ships it wherever he pleases and by whatsoever transportation he prefers. * * * "

"The error in the argument of the defendants' counsel is in assuming that the oyster in the shell was an article of commerce, when in fact the taker, who could only be a citizen of the state, as we have seen, had but a qualified interest in the oyster, which he could dispose of only in the state. It would be unsound reasoning to hold that the state could prohibit absolutely the taking of its oysters, or confine the use of them exclusively to its own citizens, and yet could not prevent

the taker from shipping them beyond the limits of the State. If the statute had undertaken to invest the taker or his grantee with a full and absolute property right and title to the oyster in the shell, so as to invest him with the power to convert it into an article of commerce, and had then undertaken to prevent its shipment, or burden its shipment with a tax, a different question might arise. That is not the case here. The state carefully guards against this condition, and it is only after being shelled can it be said that the oyster has become an article of interstate commerce."

It will be noted that the statute then under consideration by the Supreme Court of Alabama had declared that oysters within its waters should be the property of the State. That it granted to its own residents, or to their grantees within the State, the privilege of using, utilizing, or otherwise disposing of its oysters under certain prescribed conditions; that these conditions had to be fufilled in their entirety before the title of the State could be considered as divested. So that, it was impossible for any person to acquire complete ownership of the oysters of the State until full compliance with the statute had been made.

The statute further prohibited the shipping from the State of oysters in the shell, but did accord to its inhabitants and to their grantees the right to shell the oysters in the State and thereafter to ship the shelled oysters wheresoever the owner, whose title had then become complete, may desire.

As pointed out by the Court, the error in the contention there made that the statute under consideration was violative of the Interstate Commerce Clause and was a deprivation of the property of the complainants without due process of law, originated from the fact that in that case, as in the present one, it was erroneously argued and contended that the oyster in the shell was an article of commerce, when, as a matter of fact, under the statute of Alabama, as under the statute of Louisiana, the oyster could not become an article of commerce until the shell had been removed from the oyster within the limits of the State of Alabama and the shell there retained, to be converted into a valuable article of commerce.

The striking similarity between the Alabama case and that of the present cases before this Honorable Court need not be urged.

The Louisiana statutes accord to its citizens, its corporations, its residents, or to corporations operating under the laws of Louisiana, or to the grantees of any of these within the State, the privilege to acquire its salt water shrimp and oysters upon certain fixed terms and conditions, all of which we have already gone over.

The essential and sacramental conditions under which the State of Louisiana agrees to part with title to its shrimp and oysters are, that the hulls of these shrimp shall be retained in the State, and that the shells of the oysters shall be likewise retained in the State, there to be used in the manufacture of fertilizer, and as an element of chicken feed, and as road building material, railroad ballast, etc., respectively,

for the benefit of the inhabitants of the State. When these sacramental requirements are complied with, then, and not until then, do the shrimp and oysters become articles of commerce. Hence, it is legally imposisble for the statutes to be construed as an interference with interstate commerce; since nothing can become a subject of commerce until the ownership passes, as in the instant case. Louisiana owns its shrimp and oysters; it retains title to them until certain requirements are met, and until these requirements are met, no one can claim title to or ownership of the salt water shrimp and oysters of the State, and until one does acquire such title and ownership, he cannot complain that he is being deprived of property without due process of law, or that his property is burdened to the extent that he is prevented from utilizing it as an article of interstate commerce.

It is apparent, then, that there is no discrimination between the plaintiffs and any other Louisiana corporation, or between the plaintiffs and any citizen or resident of the State of Louisiana. They are all placed upon an equal footing; none of whom can remove the shrimp from the State without first removing the hulls, nor the oysters without first removing the shells.

This principle is enunciated with great clarity in *Turner v. Maryland, 107 U. S., 38; 27 Law Ed., 370.* In the body of that decision the Supreme Court said:

> "Whatever discrimination in this respect of purchases for exportation, before referred to, results from any provisions of the law, is a discrimination which, we think, the State has a right to make, resulting, as it

does, wholly from regulations which affect the article before it has become an article of commerce, and which attach to it as and when it is grown, and before it is packed or sold. The tobacco is grown with these regulations in force, and the State has a right to say what shall be lawful merchantable tobacco. This is really all that has been done in regard to the tobacco in question."

In the above case the Court had under consideration a statute of the State of Maryland, which prohibited the exportation of tobacco from the State, except under certain specified conditions and requirements. These conditions attached to the tobacco when it was grown and before it was packed and sold; hence, attaching to the tobacco before it became an article of commerce. So, it is with the shrimp and oyster industries in Louisiana. The conditions imposed by "Shrimp" and "Oyster" Acts in Louisiana, attach to the shimp and oysters before they can be packed or sold, and, therefore, before they can become articles of commerce. The requirement that these shrimp and oysters shall be first hulled and shelled before being shipped from the State does not constitute a burden upon interstate commerce, since the shrimp and oysters do not become articles of commerce until the title of the State of Louisiana to the shrimp and oysters has become completely divested, which can only be done through strict compliance with the statutes.

It is a well settled principle of law, so thoroughly determined now as to be irrefutable, that a State can regulate within its territory the liberty of fishing in

the navigable waters of the State, in the absence of any regulation by the United States.

This doctrine has been upheld in hundreds of cases, but notably in *Manchester v. Massachusetts, 139 U. S., 240, 35 Law Ed., 159.*

It will be noted that plaintiffs do not contend that the statutes of the State of Louisiana, relating to shrimp and oysters, were not enacted in pursuance of full authority by the State, nor is it contended that such acts are violative of the laws or regulations of the United States, relating to fish and fisheries. Therefore, we may place out of the argument entirely the proposition of whether or not the State of Louisiana had a right to adopt the statutes in question.

The policy of the Louisiana statutes is to render public rights and public commodities more valuable. Further, it was to stimulate and upbuild industries of the State of Louisiana, that of manufacturing into a valuable fertilizer and component of chicken feed as a by-product, shrimp hulls, and to use and utilize the oyster shells as a valuable road building material, etc., both natural resources of the State.

The laws were further enacted for the purpose of inviting canning, drying and packing factories to the State to provide for handling of shrimp, and for the purpose of establishing plants for utilization of the oyster shells, thereby increasing and enhancing the State's wealth and commerce.

All of these purposes are entirely legitimate, and laws to carry them into effect have been adopted by

practically every State of the Union, and these statutes, because of the very reasons which permitted their enactment, have uniformly been upheld by the High State Courts and the Supreme Court of the United States.

In the case of *Smith v. Maryland*, cited herein, and quoted from, the Court said:

> "That the State may forbid all such acts as would render the public right less valuable."

And in consideration of that right, it was pointed out in *State v. Harrub*, already referred to, that the unrestricted shipping from the State of oysters in the shell would defeat the utilization of the shells in the propagation of oysters, and thereby render the public right less valuable.

> Citing *Section 5, Vol. 2, U. S. Commissioner of Fish and Fisheries, page 564.*

So, in the present case, would the unrestricted shipping of unshelled shrimp and unshelled oysters from the State of Louisiana defeat the utilization of the hulls and shells for valuable commercial purposes—that of manufacturing the same into fertilizer and chicken feed, and road building material, ballast, etc., and thereby render the public right less valuable.

We anticipate that the plaintiffs will attempt to place some reliance on the case of *Elmer v. Wallace, 275 Fed. Rep., 86.* In that case the Court had under consideration a statute of the State of Alabama, which imposed a tax of 5 cents per barrel upon salt water

shrimp taken from the waters of the State for canning, drying or shipping within the State.

Section 8 of that Act, while making it unlawful to transport such shrimp *by water* beyond the boundary of the State, unless the usual price paid therefor at the place to which they are transported is higher than paid in the State, also imposed a tax of 20 cents per barrel on shrimp so transported outside; and Section 12 of the Act prohibited any person who had not for more than a year been a *bona fide* resident of the State from catching shrimp in its waters for shipment out of the State *by water*.

The Court held that the Sections 8 and 12 of the statute were manifestly intended to discriminate against canners and packers in other States, by imposing hindrances and burdens on the interstate shipment of fresh shrimp, and the aforesaid Sections 8 and 12 were found to be in violation of the commerce clause of the Constitution.

The discrimination in the Alabama statute is manifest, as the tax there imposed was not levied as a condition precedent to divesting title to the State of the shrimp, but was a direct burden upon interstate commerce and a glaring discrimination between residents of the State of Alabama and residents of other States; so that, the ruling of the Court there was clearly correct.

The Louisiana statutes, however, impose no burden upon shrimp and oysters caught and dredged from its waters after the shrimp and oysters have become articles of commerce. It places no restriction upon

the shipment of the shrimp and oysters, either within the State or out of the State, after the State's title to the shrimp and oysters has become completely divested. It simply stipulates that before shrimp and oysters caught and tonged in Louisiana waters can become articles of commerce, and before the title of the State to the shrimp and oysters may be considered as completely divested, that there shall be removed from the shrimp the hulls thereof and from the oysters the shells thereof, in order that these hulls and shells may be used and utilized as a valuable article of commerce, by converting them into fertilizer and chicken feed, and road-building material and ballast, etc., for the use and benefit of the inhabitants of the State.

Of course, we understand that plaintiffs contend that Section 13 of the Shrimp Law was designed to permit both the unhulled shrimp, as well as the hulls, to be shipped from the State of Louisiana; and, hence, the restriction placed upon the shipment of shrimp, unhulled, from the State constitutes an interference with interstate commerce, in view of the fact that the statute permitted the hulls in a manufactured state to be shipped beyond the border of Louisiana. In this, however, plaintiffs have clearly misunderstood and misinterpreted the language of Section 13 of the aforesaid act.

The aforesaid Section 13 reads, in part, as follows:

> "It shall be unlawful to export from the State of Louisiana any raw shells or hulls and heads of salt water shrimp as they are required to be manufactured into fertilizer

or used for an element in chicken feed. When the shrimp hulls or shells and heads shall have been conserved for the purposes herein stated, the right of property therein theretofore existing in the State shall pass to the lawful taker or the possessor thereof. Any person, firm or corporation violating the provisions of this section shall be liable to the penalties hereinafter imposed."

From the above quotation from Section 13 of the Act, it is clear that the shipment of the raw hulls of the shrimp from the State is prohibited, since these hulls are required to be retained within the limits of the State, to be manufactured into fertilizer, or to be utilized as an element of chicken feed, the idea being to conserve this important natural resource for the benefit of the inhabitants of the State; but the statute does not prohibit the shipment from the State of the unshelled shrimp, nor does it prohibit the shipment from the State of the hulls after they have been manufactured into fertilizer or chicken feed.

It is, therefore, clear that the purpose of the statute is not only entirely legitimate, but carries out the authority vested in the State, to conserve for the benefit of its inhabitants and its citizens its natural resources, to increase its industries, and to render more valuable and profitable one of the natural resources of the State.

Counsel for plaintiffs may also attempt to derive some consolation from the case of *State v. Ferrandau*, reported in the *130 La., 1035, 58 So., 870*, wherein the

Supreme Court of the State of Louisiana held that the provisions contained in Section 1 of Act 189 of the General Assembly of Louisiana of the year 1910, to the effect that "no person, firm or corporation shall ship oysters out of this State for canning or packing out of the State," was a discriminatory regulation of interstate commerce.

There is not the remotest similarity between the provisions of Section 1 of Act 189 of 1910 and any of the provisions contained in Act 103 of 1926, the "Shrimp" Act, nor in Act 258, Louisiana Legislature 1926, known as the "Oyster" Act.

When the Legislature of Louisiana, by the Act of 1910, attempted to prohibit the shipment from the State of oysters for canning or packing outside of the State, it was clearly a discriminatory regulation of interstate commerce, particularly since, under other provisions of the Act, anyone engaged in the business could have shipped oysters in unlimited quantities for any other purposes and could have canned or packed them in unlimited quantities within the State, while only the person who shipped them outside of the State, to be packed or canned without the State, was considered a violator of the law. Such a flagrant discrimination, of course, could not be upheld by any Court.

Plaintiffs contend that the enforcement of said Act, and especially Sections 13 and 19 thereof, if valid, would subject plaintiffs to prosecution and to criminal penalties and punishment unusual in character, and, besides, subject plaintiffs' property to possible confiscation, thereby inflicting an irreparable injury upon the plaintiffs.

Our answer to that is, that if plaintiffs comply with the provisions of the statute, they could not possibly be subjected to criminal prosecution and penalties. It is only those who violate the provisions of the Act who are subjected to its punishments. The penalties there imposed are not more severe than conditions warrant. In order for plaintiffs to escape these penalties, it is only necessary that they track the strict letter of the law, in which event they will find themselves precisely in the same situation as any other resident, citizen, or corporation of Louisiana, with no discriminatory clauses hampering their operations, and with nothing to prevent them from placing their property after its due and lawful acquisition into commerce.

It will be observed by Section 19 of the Act that

> "any person, firm or corporation found guilty by the Court of exporting salt water shrimp from the State, unless and until the hull or shell and head shall have been previously removed therefrom within this State shall be liable to a fine of not less than Five Hundred Dollars ($500.00) nor more than One Thousand Dollars ($1000.00), or to imprisonment of not less than six months (6) nor more than one (1) year and shall be liable to both fine and imprisonment in the discretion of the Court."

So that, the measurement of punishment lies between a minimum and maximum fixed by the statute, and the imposition of which rests solely with the Court.

In *State v. Carson, 50 Atl., 780*, a statute providing for a penalty of not more than $1000.00 or imprisonment not exceeding five years, or both, for the violation of any statute or ordinance regulating the cultivation of oysters, was held not to be within the inhibition of the constitutional prohibition against excessive fines or cruel and unusual punishment, as the statute left the matter of the severity of the punishment to the discretion of the Trial Court.

In Re Stone, 41 Atl., 658, a penalty of $20.00 for each partridge unlawfully possessed was held not to be within the inhibition of the Constitution against excessive fines and cruel punishment.

In *McMahon v. State, 7 Neb., 722, 97 N. W., 1035*, it was held

> "that a fine of $5.00, for each prairie chicken found in possession of one during the closed season, was not excessive."

In *State v. Lubbe, 45 Atl., 520*, an act providing that "it was unlawful to possess for any purpose, any lobster less than 10¾ inches in length, under the penalty of $5.00 for each lobster so possessed, was not unconstitutional and void, as being excessive, cruel and unusual punishment.

In Re Schwartz, 119 La., 290, 44 So., 20, it was said:

> "The legality of game laws has been decreed in a number of jurisdictions, including the Supreme Court of the United States. Although for the protection of non-game birds

the Legislature has adopted drastic measures, the statute does not exceed constitutional limitation."

Of course, there is no legal distinction between statutes regulating the possession of game and those relating to fish and fisheries.

We here point out, however, that the minimum fine permitted to be imposed under the Shrimp Act is $500.00, and upon conviction and sentence, even of the minimum penalty, the plaintiffs, if found guilty, would have a right of appeal to the Supreme Court of the State, and that tribunal, if it determined that plaintiffs were illegally and unduly convicted, would protect them to the full measure to which they are entitled under the Constitution.

Therefore, since it cannot be argued that plaintiffs would be deprived of due process of law, no constitutional right of theirs could possibly be violated under the circumstances.

Plaintiffs also contend that Section 4 of Act 103 of 1926 is violative of the Fourteenth Amendment of the Federal Constitution, as being a discrimination between residents and non-residents engaged in the same class of business.

Section 4, referred to, reads as follows:

"That the right to take salt water shrimp from the waters of this State and the right to can, pack or dry the said shrimp when caught are hereby granted to any resident of

this State, to any firm or association composed of residents of this State, or to any corporation domiciled in or organized under the laws of this State, operating a canning or packing factory or drying platform in this State. These rights shall be confined to such persons and corporations and are granted subject to the further conditions hereinafter stipulated. It shall be unlawful for any person not a resident of this State, or for any firm or association not composed of residents of this State, or for any corporation not domiciled in or incorporated under the laws of this State, to catch salt water shrimp in the waters of this State, or to can, pack or dry in any factory or on any platform in this State, any salt water shrimp caught from the waters of this State; and any person, firm or corporation so violating the provisions of this section shall be liable to the penalties hereinafter provided."

The plaintiffs, Foster-Fountain Co., Inc., in their bill of complaint, aver that they are a corporation organized under the laws of the State of Louisiana, with a domicile in the City of New Orleans, in said State, which location, if correct, places them in the same class and category as any other resident, firm or association composed of residents of the State, or of any corporation domiciled in or organized under the laws of this State. Plaintiffs, therefore, being legal residents of the State of Louisiana, have no cause to complain of what they may conceive to be a discrimination against non-residents. That only such non-residents

themselves, if they feel aggrieved by the statute in question, have a standing in Court to attack the statute on the ground of discrimination.

As to the plaintiffs, the Sea Food Company claiming to be a corporation organized under the laws of the State of Mississippi, domiciled at Biloxi, Harrison County, Mississippi, they do not allege that they have qualified to do business in the State of Louisiana, by complying with the General Corporation Law (Act 267 of 1914, p. 521), by filing in the office of the Secretary of State of Louisiana a certified copy of its certificate of incorporation, and its Articles of Incorporation, and obtaining from the Secretary of State a certificate authorizing it to exercise the same powers, rights and privileges as are accorded to similar domestic corporations. Hence, this Court is without authority to judge or determine whether or not the plaintiffs, the Sea Food Company, have a proper standing in Court to attack the constitutionality of the statute in question.

But even if the latter corporation has authority to attack the constitutionality of the aforesaid "Oyster" and "Shrimp" Laws of Louisiana, our answer is that the State of Louisiana has a right in the conservation of its natural resources to discriminate between its residents and non-residents, as the authorities already quoted clearly demonstrate.

As we have already pointed out, the citizens of one State are not vested by the Constitution of the United States with any interest in the common property of the citizens of another State. A State can grant

to its own citizens the exclusive use of land covered by water, and may prohibit, under a penalty, their use for such purpose by citizens of other States.

In *Barbier v. Connelly, 113 U. S., 31, 28 L. Ed., 923*, it was said:

> "Class legislation, discriminating against some and favoring others, is prohibitive, but legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

We here point out that as to the first-named plaintiff, it is placed in the same class and category as any other resident of the State of Louisiana; and as to the second-named plaintiff, it is placed in the same class and category as any other non-resident of the State.

The leading case on this point is *McCready v. Virginia*, reported in *94 U. S., 391, 24 Law Ed., 248.*

To the same effect are *Smith v. Maryland, 18 How., 71, 15 Law Ed., 269; Smith v. Levinus, 8 N. Y., 472.*

In the *McCready* case, the opening paragraph of the opinion states:

> "The precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other states from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege."

And it was there held that a State may grant to its own citizens the exclusive use of lands covered by water, for raising oysters, and may prohibit, under a penalty, their use for such purpose, by citizens of other States, the conclusion being based upon the very correct reasoning that the citizens of one State are not invested by this clause of the United States Constitution with any interest in the common property of the citizens of another State.

Of course, it cannot be disputed that the shrimp and oysters in Louisiana waters are the property of the State of Louisiana. In fact, this admission is contained in the bills of complaint of the plaintiffs, for which reason it is within the province of the State to conserve its natural resources for the benefit of its residents and inhabitants, and to exclude entirely, if it sees fit, any non-resident from participating in any benefits to be derived or advantages to be obtained from any of the State's resources.

Plaintiffs further contend that Section 13 of Act 103 of 1926 is unconstitutional, in that it attempts to compel plaintiffs to pack shrimp in Louisiana at a loss, and as a condition precedent to their making and filling contracts for such packed shrimp to be placed in interstate commerce.

Our answer to that is, that there is no law compelling plaintiffs to engage in the business of canning and packing shrimp in Louisiana, but that if they elect to avail themselves of the privileges which the laws of Louisiana liberally bestow upon them, it is necessary that they comply with the Louisiana statutes; that the fact that plaintiffs have seen fit to make con-

tracts for the delivery of shrimp which they are unable to fulfill without violating the laws of Louisiana, is no reason why the statute of Louisiana, enacted for the purpose of conserving an important natural resource, should be declared unconstitutional, discriminatory or unjust.

Section 13 of the Act in question declares all salt water shrimp and the shells or hulls and heads thereof to be the property of the State of Louisiana; it further declares the shells or hulls and heads to be valuable for use as a natural resource of the State as a fertilizer, or as a component of chicken feed; and it makes it unlawful to hereafter export from the State of Louisiana any salt water shrimp from which the shell or hull and head shall not have been first removed.

We are taking the liberty of quoting the aforesaid Section 13, in full:

> Section 13: "All salt water shrimp and the shells or hulls and heads of all salt water shrimp are hereby declared to be the property of the State, and the shells or hulls and heads to be valuable for use as a natural resource of the State as a fertilizer in the State; and it shall therefore and hereafter be unlawful to export from the State of Louisiana any salt water shrimp from which the shell or hull and head shall not have been removed.
>
> In order that all of the inhabitants of the State of Louisiana may enjoy the State's natural food product, it shall be lawful to ship unshelled shrimp from any point in the State of Louisiana to any other point in the State

of Louisiana for edible consumption, subject to such regulations and restrictions as may be imposed by the Department of Conservation. Any person, firm or corporation of this State who shall lawfully take any shrimp from any of the waters of the State, or lawfully acquire the same, shall have a qualified interest or property in the shrimp so taken or acquired in the shells, which qualified interest may be sold or transferred to any other person, firm or corporation within the limits of the State; and after the edible portions of the abdomen popularly called tail meat of said shrimp shall have been removed from the shell, within the State of Louisiana, such lawful taker or possessor, his heirs or assigns, as the case may be, shall be vested with all of the rights and property of the State in and to said shrimp tail meat and shall have the right to sell such shrimp tail meat or ship the same beyond the limit of the State, without restriction or reservation.

It shall be the duty of all licensees operating under the Department of Conservation in the shrimp industry in this State to conserve for fertilizer purposes all shells or hulls and heads of salt water shrimp and to report monthly, on blanks to be furnished by the Department of Conservation, the quantity thereof on hand, to the Department of Conservation. It shall be unlawful to export from the State of Louisiana any raw shells or hulls and heads of salt water shrimp as they are

required to be manufactured into fertilizer or used for an element in chicken feed. When the shrimp hulls or shells and heads shall have been conserved for the purposes herein stated, the right of property therein theretofore existing in the State shall pass to the lawful taker or the possesor thereof. Any person, firm or corporation violating the provisions of this section shall be liable to the penalties hereinafter imposed."

The only condition precedent to the utilization of the shrimp which the plaintiffs may acquire, and of which plaintiffs complain, is that they are required to first remove from the shrimp purchased by them the heads and shells or hulls of the shrimp, which the statute requires shall remain within the State, to be converted into fertilizer, or used as a component part of chicken feed. If the State has the unlimited authority to prohibit the shipment beyond its limits entirely of shrimp, which right it unquestionably has, for a stronger reason is the State vested with authority to permit the shipment from beyond its limits of shrimp under certain restrictions, particularly if the restrictions are reasonable and not violative of any constitutional right or authority.

As has already been pointed out, the doctrine laid down in the case of *State v. Harrub* is thoroughly applicable to the instant case, since the statute of Alabama, which prohibited the shipment of oysters from the State of Alabama in the shell, was declared by the Supreme Court of that State to be valid and constitu-

tional, and this decision has remained as authority to this day, having been quoted and approvingly referred to by other Supreme Courts of other States of the Union.

Plaintiffs contend that the said Act violates the Fourteenth Amendment, in that plaintiffs are forbidden from shipping out of Louisiana with hulls and shells on any shrimp which it may acquire lawfully within the limits of the State of Louisiana, thus constituting an interference with interstate commerce and depriving the petitioners of due process of law and of equal protection of the laws, all in violation of the aforesaid Fourteenth Amendment.

While this contention is only a reiteration of those already noted, we answer it by quoting from *State v. Harrub, 95 Ala., 187, 10 So., 752,* as follows:

> "If the State has the power to prohibit the exportation of its oysters absolutely, *a fortiori*, it may limit the shipment of such oysters to such as may have been shelled. If the Legislature sees proper, as a means to prevent the exhaustion of its oyster-beds, to grant to the takers, who can only be resident citizens of the State, or their grantees within the State, such a qualified property right in the oyster as will permit its exportation only after it is shelled, where is the authority to judicially control this discretion, or what principle of the interstate commerce law is violated by such an enactment? The oyster is the absolute property of the State. The

State certainly has the power to prevent its becoming an article of interstate commerce. Congress has no authority or control in the premises. The State, by the statute itself, expressly retains the title to the oysters, and prohibits their shipment beyond the State until shelled. Only after it is shelled does the State reliquish its title, and the grantee previously having a qualified interest, becomes the absolute owner, and the oyster may then become an article of interstate commerce. When shelled, and the State has parted with its property rights, the State no longer interferes with the article. The owner ships it wherever he pleases, and by whatsoever transportation he prefers."

Plaintiffs further contend that the aforesaid Section 13 of said Act 103 of 1926 violates the commerce clause of the United States Constitution, in that

(a) said section imposes a direct burden upon interstate commerce;

(b) because said Act was not passed to conserve the natural resources of Louisiana;

(c) because said Act is not a proper exercise of the police power.

As to the contention (a), that the aforesaid Section imposes a direct burden upon interstate commerce, we believe we have already sufficiently pointed out that this contention of the plaintiffs in unfounded in fact and in law. Since the shrimp and oysters can-

not become articles of commerce until the State's title thereto has become divested, there is no opportunity to argue that the statutes impose a burden upon interstate commerce, unless it be shown that such burden is attempted to be levied after the title of the State to the shrimp and oysters has been divested, and after the shrimp and oysters have become articles of commerce.

As to the contention (b) that the Act was not passed to conserve the natural resources of Louisiana, we quote the title of the Act, as follows:

> "AN ACT to declare all shrimp and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership; to encourage, protect, conserve, regulate and develop the shrimp industry of the State of Louisiana; to provide penalties for the violations of the provisions of this Act, and to repeal all laws in conflict herewith."

The title of what is known as the "Oyster Law" of Louisiana reads as follows:

> "AN ACT to declare all oysters and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership; to encourage, protect, conserve, regulate and develop the oyster industry of the State of Louisiana, to provide penalties for violations of the provisions of this Act and to repeal all laws in conflict herewith."

It is, therefore, clear from the titles of both Acts, that their purpose is to conserve important natural resources of the State, to-wit, Shrimp and Oysters.

The Oyster and Shrimp Laws were adopted by the Legislature in pursuance of express authority delegated to it by the Constitution of Louisiana, Article VI, Section 1, reading as follows:

> "The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. *The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof.*"

Therefore, not only do the Acts in question provide for the conservation of shrimp and oysters, but these Acts have been passed under specific authority of the Constitution, which makes it mandatory upon the Legislature to enact all laws necessary to protect, conserve and replenish the natural resources of the State, and, further, to prevent *any wasteful use* of such natural resources.

The sale of shrimp in the hulls and sale of oysters in the shell, and the shipment of shrimp from the State in the hulls and oysters in the shell unquestionably constitute a wasteful *use* of these important natural resources. And with the idea of retaining, for the benefit and use of the State, the hulls and heads of shrimp and shells of the oysters, and requiring that they be retained within the State, to be utilized as fertilizer and as a component part of chicken feed, and as road-building material, ballast, etc., respectively, the Legislature adopted these Acts, thus endeavoring to prevent a wasteful use of shrimp hulls and oyster shells, as well as the shrimp and oysters themselves.

As to the third contention (c) that the adoption of the aforesaid Act 103 of 1926 and the regulations therein contained is not a proper exercise of the police power, the authorities are so numerous to the effect that statutes of that character may be adopted and enforced under the police power of a sovereign State, that it would be useless to attempt to cite them all.

It has been repeatedly held that wild animals within the borders of the State, or, in fact, any of its natural resources, are, so far as being capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the State may regulate and control the taking, subsequent use, and property rights that may be acquired therein.

The following decisions fully substantiate the doctrine just hereinabove set out:

Geer v. Conn., 161 U. S., 519, 528, 40 L. Ed., 793.

Silz v. Hesterberg, 211 U. S., 31, 53 L. Ed., 75.

Carey v. So. Dakota, 250 U. S., 118, 63 L. Ed., 886.

Pattsone v. Pennsylvania, 232 U. S., 139, 58 L. Ed., 539.

State v. Rodman, 59 N. W., 1098.

In the case of *Lacoste v. Conservation Department, 263 U. S., 549, 68 L. Ed., 437*, the United States Supreme Court said:

> "The legislation is a valid exertion of the police power of the state to preserve and protect wild life for the common benefit. It is within the power of the state to impose the exaction, as a condition precedent to the divestiture of its title and to the acquisition of private ownership."

The contention is urged that the aforesaid Section 13 further violates the Fourteenth Amendment, and Section 14 of Article XIX of the Constitution of Louisiana, as well as the commerce clause of the United States Constitution, because, (a) it imposes a direct burden upon interstate commerce; (b) creates a monopoly in the manufacture and sale of shrimp; (c) places such business in the hands of a small number of corporations engaged in said business in Louisiana; and (d) that said Act was intended to, and will have the effect of, reducing the price of raw shrimp and un-

shelled oysters and increasing the price in interstate commerce of the finished product.

We pass over the first contention to the effect that it imposes a direct burden upon interstate commerce, for the reason that it has been fully answered hereinabove.

To the contention that the Act creates a monopoly in the manufacture and sale of shrimp and oysters, we answer that the Acts contain nothing which would substantiate such a theory. The people, citizens, residents and corporations of the State have unlimited right to engage in the shrimp and oyster industry in Louisiana, but are merely required by the statutes in question to comply with certain restrictions and regulations which the Acts contain, and which restrictions and regulations are required to be strictly observed in order to divest the State of its ownership in its shrimp and oysters and to permit them to become articles of commerce. Any number of persons who may care to, have unhampered and unrestricted opportunity to engage in the shrimp and oyster business in Louisiana, subject, of course, to the regulations which Louisiana has imposed upon that business.

In answer to the contention (c) that the Acts place the shrimp and oyster business in the hands of a small number of corporations engaged in said business in Louisiana, it may be said, as in answer to contention (b), that if there are only a small number of corporations engaged in the shrimp and oyster business in Louisiana, it is not because the "Shrimp" and "Oyster" Acts prohibit persons from engaging in said business, the intention of the Acts was to stimulate, upbuild, in-

crease and develop the shrimp and oyster industries in Louisiana, and if there are only a small number of corporations engaged in that business, it is not because the statutes are responsible therefor.

To the contention (d) that the "Shrimp Law" was intended to, and will have the effect of reducing the price of raw shrimp and increasing in price in interstate commerce the finished product, this contention is merely one of fact and must be substantiated by positive proof on the part of plaintiffs, and if they have so established these facts, we still contend that it can have no bearing upon the legality or the constitutionality of the Act under consideration.

Plaintiffs contend that Section 19 of the aforesaid Act 103 of 1926 was intended to have the effect of burdening interstate commerce, and to create a monopoly. The imposition of the penalties provided by Section 19 of this Act, for the seizure of vessels, their tackle and apparatus, used in the illegal taking of salt water shrimp from the waters of this State, can in no sense be construed as imposing a burden upon interstate commerce, much less can the provisions of that Section be construed as creating a monopoly in favor of Louisianians engaged in the shrimp industry.

In *Smith v. Maryland, 18 How., 71, 15 Law Ed., 269,* the Court held:

> "It is within the legislative power of the state to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of such law."

Clearly, if the statute failed to provide punishments and penalties for those who are guilty of violating it, the statute would be impotent and useless.

Anyone may engage in the shrimp industry, under the provisions of the aforesaid Act, and if he is observant of the conditions and stipulations of the statute, there is not the remotest likelihood of punishment being inflicted upon him. But if he violates and transgresses the law, certainly he is amenable to such punishment as the statute provides. The infliction of these penalties and punishments can in no sense be construed as an interference with interstate commerce or as placing a burden thereon, nor can it be considered taking of property without due process of law, or as a denial of equal protection of the laws.

Freund, on Police Power, p. 561, Sec. 528, says:

> "Game unlawfully killed may de destroyed summarily since no property in it can be acquired while the law prohibits its taking. In this case there is no forfeiture since there is no property right."

In the *Lacoste* case, already referred to, the Supreme Court of the United States, at page 548, said, in part:

> "It is alleged that the defendant in error is about to seize and confiscate all shipments of skins and hides to be made by plaintiff in error, and that such seizure would be illegal and would constitute a taking of property without due process of law and would inflict

upon them irreparable injury and damage, leaving them without remedy therefor."

"These allegations were, for the purpose of the trial, taken as true."

The Supreme Court in that case upheld the constitutionality of the statute then under consideration, which provided for the seizure and confiscation of certain furs and pelts.

In Re Schwartz v. State, 119 La., 295, 44 So., 20, the Supreme Court of Louisiana said:

"To the argument that the act deprives persons of their liberty or authorizes seizures without due process of law, and that in consequence it is violative of Section 8 of Article I of the Constitution of the United States, it is sufficient answer to state that the trend of the decisions do not sustain the contention of the defendant."

In *State v. Jackson, 152 La., 655, 94 So., 150,* the contention is made that the Hood Act was unconstitutional, in that it deprived a person of his property without due process of law, and authorized the destruction of his property and was otherwise unconstitutional and violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States. In that case the constitutionality of the statute was upheld, together with its entire provisions.

In *Samuels v. McCurdy, 267 U. S., 188, 69 L. Ed., 568,* the United States Supreme Court said:

"The seizure and destruction, without compensation, of such liquors (unlawfully

possessed) pursuant to State prohibition laws, does not deprive such possessor of property without due process of law."

In *North American Storage Co. v. Chicago, 211 U. S., 306, 53 L. Ed., 193*, the Court said:

> "Under its police power the State has the right to seize and destroy food which is unwholesome and unfit to use, and in exercising such a power, due process of law, within the meaning of the Fourteenth Amendment, does not require previous notice and opportunity to be heard; the party whose property is destroyed has a right of action after the act which is not affected by the *ex parte* condemnation of the state officers."

In *New Orleans v. Charouleau, 121 La., 890, 46 So., 911*, the Supreme Court of the State upheld an act which provided that incurable cows may be slaughtered under the orders of the State Board of Health, without compensation to the owners thereof.

In *Lawton v. Steele, 152 U. S., 133, 38 L. Ed., 385*, a statute of the State of New York regulating fishing was attacked as unconstitutional. The statute authorized the summary destruction by any person of a net or device being used in violation of the law, and also provided that no action for damages would lie against any person on account of said destruction. The constitutionality of these provisions were sustained under the police power.

To the same effect is *Bittenhau v. Johnson, 92 Wis., 588, 66 N. W., 805, 32 L. R. A., 380,* wherein the case of *Lawton v. Steele* is cited and quoted from.

In *Smith v. Maryland,* cited above, where a statute forfeiting a boat because it made an illegal use of an oyster dredge, was upheld.

The plaintiffs contend that the aforesaid Section 19 of said Act also violates the Fourteenth Amendment of the Federal Constitution, since plaintiffs are denied the right to contract for shrimp with hulls on and to ship them with hulls on in interstate commerce.

The complete answer to this is that plaintiffs have no right to complain that they are prohibited from contracting for the shrimp with hulls on, and to ship the same in interstate commerce, for the reason that the statute provides that these shrimp shall be and continue to remain as the property of the State until the title of the State is completely and fully divested in the manner provided for by the Act, and until such title is divested the shrimp cannot become articles of commerce and cannot be placed in interstate commerce. (Tr. 28, Rec. 768).

The same argument applies fully to the "Oyster Law."

Plaintiffs are presumed to know the law, and since the law prohibits the shipping out of the State of shrimp with the hulls on and unshelled oysters,

plaintiffs are without right to complain if they have contracted to sell shrimp with the hulls on, or to buy oysters with shells on, in defiance of the statutes which prohibit that the shrimp shall be shipped out of the State unless unhulled and the oysters shall likewise be shipped out of the State unshelled.

Plaintiffs contend that they are not permitted to ship shrimp out of the State unhulled, nor to acquire oysters unshelled, and therefore are unable to comply with their contracts or to operate their business at a profit, thus being deprived of their property without due process of law, and thus having their interstate trade burdened and interfered with; that they are thereby denied the equal protection of law through burden or discrimination, all in violation of the Fourteenth Amendment. This contention has already been fully met in the argument already hereinabove outlined.

The plaintiffs contend that Sections 4 and 13 of the Act 103 of 1926 further violate the Fourteenth Amendment and Section 2 of Article I of the bill of rights of Louisiana, in that in the enforcement of the law persons residing in Louisiana are permitted to ship whole shrimp out of the State, by filing a false affidavit to the effect that the shrimp are caught beyond the 3-mile limit, whereas, plaintiffs are not accorded that privilege.

While this is only an argumentative contention predicated upon fact and not law, we assert that the

statute makes no such distinction or discrimination as plaintiffs contend. The statute does not provide for the taking of false affidavits, nor does the statute prohibit the plaintiffs from catching shrimp beyond the three-mile limit of Louisiana waters. Hence, there can be no such violation of the State and Federal Constitutions, as plaintiffs contend.

The affidavits contained in Record No. 768 (Tr. 54 to 108, inc.) to the effect that the Conservation Department of Louisiana has willfully permitted the aforesaid law to be violated, are fully refuted by the affidavits of the defendants in error. Of course, there is no intention or desire on the part of the officials of the State of Louisiana to countenance the violation of the law which they have always striven to enforce, and while it is a harsh allegation on the part of the plaintiffs in error to have declared in their petition that the State of Louisiana was willfully permitting the violation of its Conservation laws, the plaintiffs in error should at least, if the allegations set out by them were true, have produced some semblance of proof thereof.

Plaintiffs contend that they are threatened with arrest, criminal prosecution, and confiscation of their property, and will thus be subjected to irreparable injury, and thereby are entitled to an injunction to prevent their being deprived of their property without due process of law.

This contention has already been fully answered and it is settled by ample authority that the State has a right to adopt statutes providing for seizure and con-

fiscation of property when the same is being illegally used in violation of mandatory provisions of a valid law.

It is finally contended by the plaintiffs that the licenses and taxes imposed by Sections 10, 12, 14, 15 and 16 of the "Shrimp Law" are unconstitutional, and in violation of the commerce clause of the United States Constitution, the Fourteenth Amendment, and Section 3 of the Bill of Rights of Louisiana. Yet, the plaintiffs in their petition judicially pledge themselves to the payment of all of the licenses and taxes which the statute provides for in the event they are permitted to ship shrimp out of Louisiana in an unhulled state. They likewise judicially pledge themselves to the payment of all licenses and taxes which the Louisiana laws require with reference to dealing and handling oysters.

It has been repeatedly upheld by the Courts throughout the Union, as well as the United States Supreme Court, that such taxes and licenses as plaintiffs complain of are permissible, and may be levied and enforced under the inherent police power of the State. The only restriction upon such licenses and taxes is that they shall be uniform as to all classes of persons engaged in the same particular business, and shall not be so excessive as to amount to a confiscation of property or to a denial of the right of a person to engage in the business contemplated by the statute.

We deem it unnecessary to quote authorities in support of this well settled principle, and do not be-

lieve that the plaintiffs are serious in the contention which they make.

The following propositions are now firmly established in the jurisprudence of this country beyond all question:

1st. That the State owns the bed of all tide waters within its jurisdiction;

2d. That the State owns the tide waters and such fish and other natural resources as they may retain;

3d. That this ownership is that of the people of the State as tenants in common, to be kept and utilized for the benefit of the people of the State;

4th. That non-residents of the State have no right to, or interest in, this property.

New Orleans v. United States, 35 U. S., 662; 9 L. Ed., 573.

Martin v. Waddell, 41 U. S., 367; 10 L. Ed., 997.

Smith v. Maryland, 59 U. S., 71; 15 L. Ed., 269.

McCready v. Virginia, 94 U. S., 391; 24 L. Ed., 248.

Manchester v. Mass., 131 U. S., 240; 35 L. Ed., 159.

Geer v. Conn., 161 U. S., 519; 40 L. Ed., 793.

Lacoste v. Dept. of Conservation, 263 U. S., 545, 68 L. Ed., 437.

We respectfully submit that the record justifies the contention of defendants in error that the prayer for injunctive relief should be denied, and that the Acts, the "Oyster Law" and "Shrimp Law" of Louisiana, should be upheld by this Honorable Court as valid legislation and not in contravention of any of the provisions of the Federal Constitution.

Respectfully submitted,

PERCY SAINT,
Attorney General;
PEYTON R. SANDOZ,
Assistant Attorney General;
MICHAEL M. IRWIN,
Asst. to Attorney General.

JOHN DYMOND, JR.,
LEANDER H. PEREZ,
Of Counsel.

APPENDIX.

We believe we have discussed all of the important legal phases involved in the "Shrimp" and "Oyster" Laws, but, as a conclusion to this brief, we beg to submit correspondence received by this office from Judge Louis H. Burns, United States District Judge for the Eastern District of Louisiana, who sat at the trial of these cases. While the correspondence is not part of the record, it is absolutely authentic, and we believe will throw considerable light upon the questions involved. We take the liberty of quoting the entire file, as follows:

Chambers
LOUIS H. BURNS
United States District Judge
New Orleans

January 20, 1928.

"Messrs. Lemle, Watkins and Guice,
for Foster-Fountain Co. et al.
and Messrs. Dymond, Saint and Irwin,
for Haydel et als.

Gentlemen:

In view of the fact that I read the correspondence passing between Judge Foster, Judge Holmes and myself preceding our conclusion to deny a preliminary injunction in the shrimp case, when similar relief was prayed for this morning in the oyster case and counsel for the Louisiana interests were not present, I have concluded to send each side copies of these preliminary discussions, thinking that they may help counsel in pre-

paring for the submission of the matter on appeal.

These do not, of course, belong in the record of the case, and I have instructed the Clerk not to include any of them in the transcript. It will be noticed that Judge Holmes joined with us in our final conclusion, although this was contrary to the opinion he originally held while the matter was under consideration. However, as above stated, these views of the judges may assist counsel.

Yours very truly,

Louis H. Burns."

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF THE STATE OF LOUISIANA.

FOSTER-FOUNTAIN PACKING COMPANY, ET AL.,	In Equity
v.	No. 18,897
E. J. HAYDEN, ET AL.	

By appropriate proceedings the plaintiffs are seeking to enjoin the enforcement of a law of the State of Louisiana, passed in 1926, which makes it "unlawful to export from the State of Louisiana any salt water shrimp from which the shell, or hull, and head shall not have been removed."

The act is assailed as unconstitutional and void for two salient reasons, among others:

(1) That it directly and substantially interferes with interstate commerce.

(2) That it arbitrarily and unreasonably discriminates between citizens of the several states similarly situated.

The act is put forward as a conservation measure intended to benefit one of the natural resources of the State, and asserted to be within its police power.

The general principles applicable to the respective contentions have become well settled by frequent application, and may be briefly stated.

The proclaimed purpose of the statute is not conclusive, but the Federal Court will determine for itself from the character of the law, the subject upon which it operates, and the necessary effect of the language employed, whether it is repugnant to the Federal Constitution.

Under the Commerce clause (Art. 1, Sec. 8, Cl. 3) no direct burden upon interstate commerce can be imposed by any state without the assent of Congress, and the silence of Congress upon any subject is equivalent to a declaration that it should be absolutely free.

On the other hand, state laws passed in a *bona fide* exertion of the police power are

not invalid because they interfere indirectly and remotely with interstate commerce. But there must be some real connection between the actual provisions of police measures and their assumed purpose. There must be some reasonable grounds for police interference, such as the advancement of public health, safety, or morals, or as in this case, the conservation of the public natural resourses.

Fish, in their natural state, are public property, and the state may deal with them for the public weal, so long as they do not become the subject of commerce, but if the state permits them to become the subject of private property and an article of intrastate commerce, it cannot hinge the right of exportation upon arbitrary or fantastic conditions, nor, under the 14th amendment, can it arbitrarily discriminate between citizens of the several states by permitting some to ship in interstate and foreign commerce, and denying the right to others similarly situated.

In the light of these principles let us examine the act in question in three aspects:

(1) Historically.

(2) *In haec verba.*

(3) Under contemporaneous administrative construction.

It appears from the allegations and proof that the shrimp is a migratory fish existing at certain seasons of the year in inex-

haustible quantities in Louisiana waters, and that during nearly a hundred years a large fishing industry has been built up whereby several hundred fishermen make their living by catching and selling shrimp, some of which, called the green shrimp industry, are eaten while fresh, and others are manufactured into canned shrimp and sold for food.

Because of unfavorable climatic conditions, only a negligible quantity is canned in the Louisiana parishes where caught, but by far the greater portion is shipped to Biloxi, Mississippi, where exists one of the largest shrimp packing industries in the world, in which millions of dollars have been invested and upon which thousands of people depend for a livelihood.

To meet a similar condition with reference to the oyster industry, the Legislature of the State of Louisiana in 1910, with the palpable purpose of creating oyster canning factories within its own borders, or forcing the Mississippi factories to remove to Louisiana, passed an act prohibiting the shipment of oysters out of the state for the purpose of canning or packing. This act was unqualifiedly condemned by the Supreme Court of Louisiana as an unwarranted interference with interstate commerce, and as an arbitrary discrimination between citizens in similar circumstances.

State v. Ferrandau, 130 Louisiana, 1035, 58 Sou. 870.

In that case the court took occasion to say that, conceding for the purposes of argument the state might prohibit the shipment of oysters beyond her borders, she had not done so, but that any one might ship all he desired, except for canning and packing purposes. The court held this to be a regulation of interstate commerce, saying "for it is to lay an embargo upon the trader who may wish to ship a limited number of oysters to be packed and canned elsewhere, while permitting another to ship an unlimited number, which have been packed and canned within the state, for any other purpose whatever." This decision was cited in Lacoste v. Department of Conservation, 263 U. S. 545; 68 L. Ed. 437.

Secondly, examining the Act of 1926, here involved, in its exact words, we find that, under licenses, it permits shrimp to be taken from the waters of the state; permits them to be sold in the open markets of the state, to be shipped from one point of the state to any other; permits them to be canned and shipped out of the state, declares that the heads and shells are valuable for fertilizer and forbids shipping them out of the state until the heads and shells are removed and converted into fertilizer. All may then be transported anywhere. Nothing is conserved for the benefit of the people of Louisiana. Shrimp may become the subject of private property, an article of intrastate commerce, without condi-

tions, and this article of intrastate commerce may be shipped entirely out of the state in unlimited quantities, provided only the qualified owner will take off the heads and shells and make fertilizer out of them. This is the only qualification of ownership, the only limitation of absolute title, a regulation of the form the shrimp must be converted into before being transported in interstate commerce. As stated in Hannibal Railroad Company v. Hason, 95 U. S. 465, 24 L. Ed. 527, "It is a plain regulation of interstate commerce, a regulation extending to prohibition," and as it does not promote the public health, safety, or morals, or conserve the natural resources of the state, but in its natural and necessary effect is intended only to build up the industries of one state by destroying those of another, it is not within the police power.

Finally, in the third aspect, it appears that contemporaneously with its taking effect, now, and at all times, the State's duly constituted administrative authorities have intentionally and systematically construed the act to apply only to shrimp exported for canning purposes. In operation, the same law, which openly and uniformly condemns the interstate canning industry, favors and fosters the large and lucrative green shrimp industry, falling flatly within the condemnation of Mr. Justice Matthews in Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup.

Ct. Rep. 1064, namely: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Under this aspect of the act the language of the Supreme Court of Louisiana in State v. Ferrandau, *supra*, is directly applicable:

"So that the state, having made the oyster a commodity of interstate commerce, assumes to regulate and control such commerce, as those who engage in it may be actuated by one purpose or another; saying to the one shipper, 'As your purpose is that your buyers and consignees, living out of the state, shall sell or consume the oysters which you sell and ship to them, your trade is lawful;' and to the other, 'As your purpose is that your buyers and consignees, or that you, yourself, shall pack or can, out of the state, the oysters shipped by you, your trade is unlawful,' and saying to all, 'The oysters produced in Louisiana, whether in private beds or elsewhere, may be packed and canned, but whilst such packing and canning is lawful if done within the state, their shipment, for the purpose of packing or canning them, out of the state, is unlawful..'"

For these reasons I think the preliminary injunction should be granted.

(Signed) E. R. Holmes,
U. S. District Judge."

COPY COPY

17 November, 1927.

"Hon. Edwin R. Holmes,
U. S. District Judge,
Yazoo City, Miss.

My dear Judge Holmes:

This is my first opportunity to acknowledge your recent letter enclosing a memorandum of your conclusions in the case of Foster-Fountain Packing Co. et als. v. E. J. Hayden, et als. I have been very busy and have just concluded a complete examination of the record and the briefs filed. Considering these and the argument of counsel at the hearing on the application for a preliminary injunction, I have reached the conclusion that the plaintiffs have no case.

I do not propose writing an argumentative brief, but it seems to me that their bill might be bad for want of equity. The plaintiffs are both Mississippi concerns in fact. The Sea Food Company is admittedly so, whilst the Foster-Fountain Packing Company is a corporation organized under the laws of Louisiana, but is composed of three stockholders citizens of Mississippi and residents

of Biloxi who own all but one share of the stock, which is held by a citizen of Louisiana, resident of New Orleans. From the fact of the charter it appears that they organized a corporation under the laws of Louisiana simply for the purpose of fixing its domicile therein. (That act provides that none but corporations domiciled in Louisiana may engage in the shrimp fishery and industry.) Of course this action amounts to a mere compliance with the letter of the law which was intended to conserve the property of the citizens of Louisiana who are actually residents of the State. It must be borne in mind that the status of a corporation *quoad* citizenship is a legal fiction. It depends upon a presumption that the stockholders are citizens of the state in which a charter is issued and the corporation has its domicile. This presumption is only available for the purpose of establishing citizenship as a jurisdictional fact in the Federal courts.

I do not call attention to this effort of plaintiffs to extend that presumption because I believe it directly affects the right of the Foster-Fountain Company to avail itself of the statute which includes Louisiana corporations, but because I think it important to consider the actual status of the parties, in considering their right to appeal to a court of Equity for relief in connection with other facts shown by the record. For instance, that this suit was filed on September 6th, 1927,

and the supporting verifications of the bill of complaint are dated respectively August 18th and August 22nd, 1927, the bill itself being one complaining of a statute passed by the Louisiana Legislature early in 1926, in which its effective date was postponed until June, 1927, the specific complaint being that the obligations of a contract between the two co-plaintiffs subjoined to the bill were impaired by the Act of the legislature referred to, whereas this contract contemplated the shrimping season just then beginning in August, 1927. It was not signed by the parties until August 14th, 1927, or almost contemporaneously with the signing of the bill of complaint. Moreover the contract contains the significant stipulation: "That it is understood between the parties hereto that the performance of this contract depends upon the ability of said Foster-Fountain Co., Inc., to purchase or catch shrimp in Louisiana, that is, if no shrimp are caught during the season 1927-1928, said season being a failure, then said Foster-Fountain Co., Inc., shall not be required to make delivery as herein agreed upon."

These facts appearing upon the face of the papers, considered together with the affidavits filed in evidence showing the active participation of these plaintiffs in the legislative proceedings which resulted in the passage of the Act by the Louisiana Legislature, seem to me to make the equity of the bill

very uncertain, and might be sufficient to justify the motion to dismiss or plea of estopel filed by the defendants. A decision need not rest upon this ground, however.

I am convinced that a consideration of the language of the statute and its contemporaneous administrative construction do not disclose a violation of either the Interstate Commerce clause (Art. 1, Sec. 8, clause 3) or of the Fourteenth Amendment, Section 1, i. e., of clause 2 prohibiting the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States, or of clause 3, prohibiting a denial of due process, or of clause 4,—the equal protection clause.

Your conclusion seems largely predicated upon what Justice Monroe of the Louisiana Supreme Court said in State v. Ferrandau, 130 La. 1035, where he held that the State of Louisiana contravened the Commerce clause. I take it that a Federal Court sitting within the state will interpret for itself such federal questions, since section 721 of the Revised Statutes does not contemplate that the decisions of the highest court of the state may form rules of decision for the Federal courts to follow. I attach less importance to the fact that the Supreme Court cited that case in Lacoste vs. Department of Conservation; this citation made but a casual reference to Monroe's decision to illustrate one specific interpretation of the Commerce clause. It

is certainly not an endorsement of the conclusions reached in the Ferrandau decision. Such decisions by the courts of the states at best are of scant persuasive value. Indeed, a careful reading of the Alabama Supreme Court's decision in the State of Alabama v. Harrub (95 Ala. 176), where that court sustains a statute regulating the oyster fisheries and industry similar to if not identical with that held unconstitutional by the Louisiana Supreme Court, is much the better of these decisions.

The historical background of this case is graphically portrayed in the very extended consideration given the whole subject matter by the United States Supreme Court in Louisiana vs. Mississippi (202 U. S. 1). That case arose out of these very fishery disputes. The Supreme Court found that a condition approximating civil war had arisen out of the boundary dispute and the efforts of the two states seeking by legislation to regulate the fisheries.

With this opinion in mind, the instant case appears obviously to be a prolongation of the effort of the citizens of Mississippi to hold what they took during the many years of prolonged dispute and litigation. It was during this period that their canning industry was developed, whereby they deprived the citizens of Louisiana of the only substantial benefit that could come to them by the Supreme Court's settlement of the boundary

dispute, which gave Louisiana title to all of the fisheries on the St. Bernard Peninsula, up to and including Isle au Pitre.

This peninsula projects across the southern extremity of Mississippi Sound and almost entirely across Mississippi's southern coast line, parallel to it some eighteen miles distant, rich in wild life and sea food, accounts for the development of the canning industry at Biloxi. The present value and prosperity of Biloxi, so meticulously and sedulously detailed in the affivadits supporting the bill of complaint, reflect the effect of its successful efforts thus far, and this was in no small measure aided by the Ferrandau decision, which gave the oysters to the Mississippi canneries.

Strictly speaking these facts are irrelevant and immaterial to the Federal question involved. We might well remove from consideration all of the references to the differences in climatic conditions in favor of Biloxi, which are after all differences of geography, or rather of topography, than of climate. Even if this were not so, the record clearly manifests that the defendants believe just as firmly in the possible industrial development of Slidell and other Louisiana points in St. Tammany, St. Bernard, Plaquemines and Terrebonne parishes, which will draw after it the necessary picture shows, other amusements and facilities necessary to make the

laboring population remain constant as residents of their place of employment.

The sole question presented, it seems to me, arises under the Interstate Commerce clause. The Commerce clause does not contemplate the fisheries within a state. The Louisiana statute is not aimed at commerce. It contemplates the industry as distinguished from the commerce that arises out of or rather is part of the fisheries. The plain purpose of the Act was to conserve to the citizens of Louisiana, as owners of the fisheries, the benefit of that property. The sale of shrimp may be either in the raw state or in a packed, canned or sun-dried state. It is for the State as trustee for the people to say whether or not the shrimp may be put in commerce at all, or to what extent and under what terms title thereto may pass to buyers in its market. The power of Congress does not come into play until they are susceptible of barter, sale or exchange in commerce.

It seems ridiculous to me to say that the protection of the industrial part of the fisheries is not a conservation of the resources of the State; or that the citizens of another state may build up an industry in their own state by taking property which belongs to their neighbors; or that these "aliens" have the right to complain when their neighbors exclude them from participation in their property; or that such claims may be justified on the ground that they are citizens of the

United States, and so privileged and immune; or that they are discriminated against and denied the equal protection of the laws of their neighbor state.

The cases of Manchester v. Mass., 139 U. S. 240, and McCready v. Virginia, 94 U. S. 391, define the territorial jurisdiction of states and their right to control their fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embodied in the soil, even where these exist within the open sea within the territorial limit and subject to the common right of navigation. This control is wholly and exclusively under the sway of the riparian state.

In quoting these decisions in the Louisiana-Mississippi boundary decision (202 U. S. 1), the Supreme Court said that this sway extended over all fish or pearls or amber or other products of the sea. In McCready v. Virginia, the Supreme Court held that each state owns the beds of all tidewaters within its jurisdiction and may appropriate them, to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed. That the right which the citizens of the state thus acquire is a property right and not a mere privilege or immunity of citizenship; that the second section of the fourth article of the Constitution, which declares that the "citizens of each state shall be entitled to all privileges and

immunities of citizens of the several states", does not vest the citizens of one state with any interest in the common property of citizens of another state; and finally, that Virginia had the right to exclude all but her own citizens from planting oysters in her own tidewater, and that this was neither a regulation of commerce nor a violation of any privilege or immunity of interstate citizenship.

Discussing the ownership of the people in their united sovereignty of all fish, the Supreme Court said that the title, thus held by the state for them, is subject only to the paramount rights of navigation, the regulation of which in respect to foreign and interstate commerce has been granted to the United States. There has been, however, no such grant of power to the Federal government over the fisheries, which remain in the exclusive control of the state. Their right comes to the people of the state not by virtue of their citizenship merely, but of citizenship and domicile united; that is to say by virtue of a citizenship confined to that particular locality. Commerce has nothing to do with the land or water while producing, but only with the product after it had become the subject of trade. Such property can not become the subject of trade or commerce except the state wills it so.

In my view the principles established by these decisions and followed in numerous

others indicated in Vol. 9, pp. 66 *et seq.* of Rose's Notes show the Ferrandau decision to be entirely out of line with the recognized current of jurisprudence, more especially in the following particulars:

(1) Subject to paramount right of navigation, each state owns land under tide waters within its jurisdiction, and may appropriate it to citizens as common for taking and cultivating fish;

(2) The right of fishery granted by state to citizens is property right and not mere privilege or immunity of citizenship;

(3) Constitutional guaranty of privileges and immunities does not vest citizens of one state with interest in common property right of fishery of citizens of another state;

(4) The right to plant oysters (or take shrimp) is not a privilege of interstate citizenship, and law granting such right to citizens only is not commerce regulation.

In my opinion these principles should be applied to the instant case. It is apparent to me that the Legislature when passing the Act complained of unnecessarily contracted its power, shrinking within the strictures sought to be imposed by the Ferrandau decision in fear of conflicting with the commerce clause as there defined, whereas the

Act might well have more directly have accomplished its legitimate purpose to conserve the shrimp for its citizens so that they might actually enjoy the *usus, fructus, et abusus* of their property thereafter, placing it in interstate commerce upon such terms as it might deem wise, all in the proper exercise of its police power, which includes the promotion of the people's welfare, protecting them in and conserving to them their own property as well as the protection of their safety, health and morals.

So too, the Legislature manifestly opened the door to such corporations as Foster-Fountain Company by erroneously extending the presumption of citizenship in corporations, when they permitted the domicile only of the corporation formed by citizens of any other state to participate in the fisheries with its own citizens.

However, when we consider that no burden can be placed upon interstate commerce by withholding property from commerce; that if the state has the right to withhold all of a commodity from interstate commerce, that right certainly includes the right to withhold part thereof, particularly while the title is in the state; that whilst the power of Congress is paramount over interstate commerce, it has no power whatever over an intra-state industry or of even intra-state commerce; that the state has the right to exert its police power even where it might

indirectly or remotely affect interstate commerce, provided there is a real connection between the actual provisions of the police measure and the purpose sought to be accomplished, and provided that purpose is the conservation of either the safety, health, morals or welfare of its people, then such a purpose as that of withholding all or a part of the shrimp belonging to the people from flowing into commerce until they have enjoyed the local industry and profit that comes of its ownership within the state is a legitimate, reasonable exercise of the right both to conserve the property to its owners and promote their welfare.

This is squarely contrary to the conclusion reached in the Ferrandau case. It is opposed to the idea that conservation contemplates the mere keeping or confining of the product within the state and not include a conservation of the whole property comprising the industrial part of the fishery belonging to the people.

My conclusion therefore is that neither the act nor the method of its administration are in conflict with the Federal Constitution; that even though the Act had provided for some specified portion of the shrimp to be shipped in the natural state, as some of the affidavits seem to indicate, the state would still be within its rights since, if they might withhold all from commerce, they can certainly hold a part. In this connection, though,

I am not all satisfied from the affidavits that the state officers are making such construction of the statute. There are very convincing affidavits to the contrary in the record, which indicate that perhaps some raw or green shrimp may be clandestinely or illicitly sent out of the state without the knowledge of the conservation officer, and of course the state would not be bound by such acts.

I am sending a copy of this to Judge Foster.

With best wishes and kindest personal regards, I am,

Very truly yours,

(Signed) LOUIS H. BURNS."

COPY COPY

December 23, 1927.

"Hon. Edwin R. Holmes,
Hon. Louis H. Burns,
United States District Judges.

My dear Judges:

I have had an opportunity to look into the case of Foster Fountain Company vs. Haydel and have reached the conclusion that the restraining order should be recalled and the preliminary injunction refused. I think the case of State vs. Ferrandau, 130 La. 1035, (58 South. 870) may be distinguished from other cases dealing with the subject without

impairing its authority. In that case the Act under consideration permitted the unlimited sale of oysters grown in Louisiana waters in interstate commerce provided they were not intended for canning. Judge Monroe's opinion seems to be based on this provision on the ground that it would be an unwarranted interference with interstate commerce to attempt to control the ultimate disposition of the oysters after they had entered into interstate commerce.

I think the principles of law governing the case before us may be stated as follows: The ownership of all the shrimp caught in Louisiana waters is in the State as a trustee for the whole people. It may absolutely prohibit the catching of shrimp in those waters by anyone or may permit their being caught by resident citizens of Louisiana alone. Therefore, in allowing the catching of shrimp the State may impose conditions as to the manner of catching, seasons in which they may be caught, and their ultimate shipment. It follows that the State may also impose conditions as to the disposal of the shrimp and there is no interference with interstate commerce until that commerce has begun. The mere intention to ship to other states does not create interstate commerce.

Act 103 of 1926 is somewhat ambiguous in its terms but there is no doubt that it prohibits the catching of shrimp by any one not domiciled in Louisiana and vests only quali-

fied ownership in the shrimp after they are reduced to possession. It also clearly prohibits the exportation of shrimp hulls and heads and prohibits the shipment of shrimp unless the hulls and heads have been removed. I think this was within the province of the Legislature and we are not concerned with the motive of the Legislature nor with whether the provisions are unreasonable. In my opinion these conclusions are supported by the cases of Geer vs. Connecticut, 161 U. S. 519; Manchester vs. Massachusetts, 139 U. S. 240; Lacoste vs. Department of Conservation, 263 U. S. 545, and various other decisions of the United States Supreme Court referred to in those above cited.

I can see no reason to have a further conference on the case, and it is desirable that it be decided before the first of January, as I understand that on that date the oyster law will become effective and it is quite probable that another suit will be brought to test its constitutionality. Kindly advise me of your views as soon as possible.

With kindest regards and wishing you both the compliments of the season,

I remain,

Sincerely yours,
(Signed) Rufus E. Foster."